RECENT AMERICAN DECISIONS.

Superior Court of Suffolk County, Massachusetts.

NATIONAL BANK *vs.* ELIOT BANK.

1. Where a check in the usual form, payable to bearer, is drawn by B. on the E. Bank, and passes into the hands and ownership of the N. Bank, the latter bank, the holder, cannot maintain an action in its own name against the former bank, the drawee, the check never having been accepted by the drawee, but its payment refused. Per HUNTINGTON, J.; ABBOTT, J., dissenting.
2. But where the third party, seeking to enforce the contract, is particularly designated in the contract, he may maintain an action in his own name for a breach of the undertaking.
3. The contract between a bank and its customer in deposits is in the nature of a loan, and the relation that of debtor and creditor.
4. A check, in order to avail the holder, must be presented, accepted, and charged.

This action was brought by the plaintiff bank as the bearer and owner of a certain check, drawn by Bacon, Price & Co., on the defendant bank, a copy of which is as follows:

"ELIOT BANK, *Boston, Jan.* 22, 1856.

"Pay to 348, or bearer, fourteen hundred dollars.

"BACON, PRICE & CO."

"To the Cashier.

It appeared in evidence that Bacon, Price & Co. were depositors at the Eliot bank, and that said bank had been in the habit of receiving and paying the checks of that firm for some time previous to the date of this suit; that the said check was presented for payment on the day of its date, and that the defendant bank then had the sum of $2,009.67 to the credit of Bacon, Price & Co. in their deposit account, but refused to pay said check. It also appeared that at the time of the presentment of said check the Eliot bank had certain promissory notes, signed by Whittier & Warren, who had failed, and endorsed by Bacon, Price & Co., not then due, and for a greater amount than the sum to the credit of Bacon, Price & Co. in their deposit account.

The case was taken from the jury and argued before the full court, and the opinion of the court delivered by

HUNTINGTON, J.—In this case the plaintiff corporation was the holder of a check, drawn in common form by the defendant corporation, and seasonably presented at the counter of the Eliot bank for payment. Payment and acceptance were refused, and the plaintiff, as holder, seeks to maintain this action for such refusal. Whether the drawers would have a remedy in their own names is not the point in dispute. Can the payee or holder of the check intervene, and in his own name hold the bank upon which it is drawn? As this question lies at the foundation of the suit, it is not now necessary to take notice of the other facts found or agreed between the parties—demand, protest, the state of accounts, and dealings by the respective banks.

The authorities, so far as they speak of the precise nature of the contract between the bank and its customer in common deposits, treat it as in the nature of a loan, and the relation arising as that of debtor and creditor, not a deposit merely. The bank opens an account of debit and credit. It employs the money for its own use; it becomes part of its general assets. No third party is named or known, and the bank is liable to answer the checks of the customer to that amount. *Carr* vs. *Carr*, 1 Merivale, 541; *Devaynes* vs. *Noble*, *Ibid.*, 568; *Commercial Bank of Albany* vs. *Hughes*, 17 Wend. 100; *Sims* vs. *Bond*, 2 Nev. and Man. 608. In this last case A, in his own name, deposited with C., his banker, funds which were the proceeds of a partnership sale of partnership effects, which belonged to A, together with one B. The question was, whether in a suit against the banker for the money so deposited by A, B could be joined with A, and it was held that he could not, because, say the court, there was no privity of contract with the partners A and B, and, it is added, "sums which are paid to the credit of a customer with a banker, though usually called deposits, are in truth loans by the customer to the banker, and plaintiffs who seek to recover the balance of such an account must prove that the loans were made by them." It is obvious that the plaintiffs, in the case at bar, could not recover on this ground.

In Byles on Bills, p. 16, note, the author seems to deny that the holder of an unpaid check has an equitable claim on the drawee, even in bankruptcy, so as to prove under the fiat as assignee of a chose in action, and he cites a case where commissioners in bankruptcy, after taking time to consider, disallowed the claims of several holders of checks on the bankrupts, who claimed to prove as equitable assignees of choses in action.

The contract between the bank and the customer rests on an implied obligation, one and entire, between the parties only, and not for the benefit of any third person. It is well settled that an order or draft for a part only of the debt or liability of the drawee does not, against his consent, amount to an assignment of any portion of the debt or liability, and does not authorize the institution of a suit in the name of the assignee, for the whole or any part, because a debtor is not to have his responsibilities so far varied as to subject him to distinct demands on the part of several persons, when his contract was one and entire. *Gibson* vs. *Cook*, 20 Pick. 15.

In *Bullard* vs. *Randall*, 1 Gray, 606, the judgment of the court proceeded on the ground that a check must not only be presented, but accepted by the bank and charged, in order to avail the holder, and that a verbal assent of the cashier, away from the counter of the bank, cannot avail him. If the bank, therefore, as in the case at bar, refuse to accept and pay, it seems that the holder has nothing of which he can "avail" himself as against the bank, and can maintain no action in his own name. In *Taylor* vs. *Wilson*, 11 Met. 52, it was held that if a creditor, in payment of a debt, take a check upon a bank, and the bank fail, or the check be dishonored, the check is mere evidence of a debt due from the drawer, not a payment, and the creditor's remedies against the drawer remain entire, if he is not guilty of laches.

The usage of banks in giving what are known as certificates of deposit, where third persons are intended to have the benefit of money thus passed to the banks, in which the money is expressly stated to be payable to the order of such third person on the return of the certificate, throws some light on the nature of the contract in cases of common deposits, where no third party is recognized in terms. It is not the custom to present checks for mere acceptance,

or to give notice, or for the holder to sue the bank upon a refusal to accept. If an action can be sustained by the holder of a check against the bank, under the circumstances of this case, it is singular that, so far as our search has reached, no precedent of the sort can be found in the books.

On the other hand, there are dicta of judges, and of text-books, and analogies of the law, to the effect that such an action cannot be sustained.

In *Bellamy* vs. *Majoribanks*, 8 E. L. and Eq. Rep. 517, where the question was as to the effect of "crossing checks," the Attorney General, Cockburn, says, in the course of his argument, that "the banker owes no duty to the holder, and is liable to no action at his suit, if the check is not honored." This was not controverted by the opposing counsel. But what is of more weight, Baron Parke, in his opinion in the same case, treats it as a familiar well-settled principle, and says:—"The lawful holder of the check is of necessity entitled to receive payment of it. He could not sue the drawee unless the drawee had accepted the check, a practice not usual, but he could sue the drawer for non-payment, if he was the holder for value."

When, therefore, in *Marzetti* vs. *Williams*, 1 B. & Ad. 415, it was held that a banker was liable in an action of tort or contract to the customer for refusing to pay a check when in funds, though no actual damage was sustained, on the ground that the contract was to pay all drafts presented in a reasonable time after receiving the money, it is clear that the court did not mean to decide that the banker was also liable to the holder of the check, or under a contract with him.

The consideration that he was not liable to the holder would seem to be a good reason why he should be liable over to the drawer in tort or contract.

In *Chapman* vs. *White*, 2 Selden, 412, it is said the drawee owes no duty to the holder of a check until after it is accepted. The right of the depositor is a chose in action. The draft or check of the depositor does not transfer the debt, or a lien upon it, to a third

person without the assent of the depositary, and *Dykers* vs. *Leather Man. New Bank*, 11 Paige, 616, is cited.

In Chitty on Bills, under the head of "Acceptances," p. 280, 281, it is said a banker is liable to an action by the customer if he should refuse, having sufficient money in hand to honor the check of his customer, but that, in case of refusal, the holder has not any remedy at law against the drawee or banker on the funds in his hand. The law, however, says the author, is otherwise in France. He adds, as to bills of exchange, that if the drawee, by course of business, has impliedly engaged to accept, and afterwards refuses to perform, then he is liable to the drawer, but not to any other party. Even this has not been adopted as a rule of law in this country. To introduce it here now, as to checks, would be introducing a novel principle, multiplying the distinctions and rules of mercantile law. There is good authority for holding that an express precedent promise to accept a draft, to be afterwards drawn, is a chose in action not negotiable or assignable so as to enable the assignee to maintain an action in his own name.

Chancellor Kent says, it seems to be a little difficult to understand how the endorsee of a bill, subsequently drawn, can charge the drawee with acceptance by virtue of such a preceding promise, which is not of itself assignable, and is strictly no part of the negotiable contract. *McEvers* vs. *Mason*, 10 Johns. R. 215; *Ontario Bank* vs. *Worthington*, 12 Wend. 598. This reasoning applies with quite as much force to a check "subsequently drawn" as to an ordinary bill of exchange. That such a known legal distinction exists between checks and bills of exchange would be a difficult proposition to support upon any decided cases.

A further inquiry arises whether the contract between the customer and the banker can be brought within the principle, now well established, and which has been applied to a certain class of cases to be found in the books, viz: that if A receives money of B, to the use of C, though there is no communication between A and C, and no privity other than what arises from the duty of paying, an action will lie in behalf of C against A. In other words, that when one person, for a valuable consideration, engages with another by simple

contract to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement.

This principle has been applied in this State in *Hall* vs. *Marston*, 17 Mass. 575; in *Arnold* vs. *Lyman*, *Ibid.* 400; and in *Carnegie* vs. *Morrison*, 2 Met. 402. In these cases, however, and in the cases cited by the court in giving the opinion in 2 Metcalf, it will be found that the third party, seeking to enforce the contract, is particularly designated and named in the contract, that the person who is to receive the benefit is specifically pointed out.

In *Hall* vs. *Marston* the defendant was specially directed, when he received the remittance, to pay over a certain sum named to the plaintiff, and the court held that he was to be charged as an agent, who had accepted the agency, and that he could not follow his directions as to receiving the money and disobey them as to the application of it.

In *Arnold* vs. *Lyman*, the defendant, Lyman, took an assignment of the notes and goods of one Hutchins, and in consideration promised him to pay certain liabilities due to himself, and also a note of the plaintiff, who was mentioned by name. The court held that the plaintiff might sue the assignee, defendant, on the ground that the promise might be considered as legally made to the several creditors named in the assignment, because the promise was to pay certain particular debts, and that, therefore, it might be treated as a promise to the creditors, and that, bringing the action by the plaintiff, to whom a note was due, was an assent to the promise, it being for his interest that it was made. But in the case of a bank deposit or loan, like that at bar, no particular debts are named, no particular creditors, and there is no appropriation of the moneys at the time of the deposit.

In *Carnegie* vs. *Morrison*, the third party, plaintiff, was named in the letter of credit written by the defendants, through which the defendant was held liable as on a contract made with the plaintiff, though the letter was merely addressed to a person who owed the plaintiffs, and who procured the letter of credit for their benefit.

The contract between the bank and its customer in deposits does

not, therefore, seem to come within the letter or spirit of the principle and reasoning recognized in these cases of money received by A from B for the use of C, or for the benefit of a third person. To apply it to a loan or deposit would seem to be forcing it into service for which it was never designed, and for which there is no precedent. Judgment must therefore be for defendant.

ABBOTT, J., (dissenting.)—After the best consideration that I have been able to give to the question involved in this case, I have been unable to agree with the other members of the court in the conclusion at which they have arrived. Although, unfortunately, there are no adjudicated cases in England or this country directly in point, I think a careful consideration of the principles applicable, and of decisions in analogous cases, will enable us to come to a satisfactory result, and one in accordance with the universal practice and understanding of the commercial and business community, and every member of it who may have occasion to give or take a bank check. It is certainly important to all that the respective rights and obligations of the holder and drawer of a banker's check should be settled and defined, so that upon a matter of such constant and often recurring importance as the law governing that class of securities, there should be no doubt. The simple question presented in this case is, whether a bank or banker with whom a customer has deposited cash, to be drawn out upon his checks, is liable in a suit by the holder of a check who has presented it at a proper time and been refused payment, although the drawee is in funds deposited for the purpose of being appropriated for such payments.

I think the law to be, that if a holder of a bank check presents it at a proper time and demands payment, the bank possessing funds of the drawer, deposited for the purpose of meeting checks to be drawn by him, and payment is refused, he can recover the amount of it in an action against the bank. What is the contract between the depositor and the bank? Beyond all question simply this: In consideration that the depositor will let his cash remain with the bank, either with or without interest, as shall be agreed upon, until he wants it, they agree to pay it out in such sums as he shall draw checks for, to any persons who shall present such checks. This is

the contract between the bank and its depositor in the ordinary course of business, as it is understood by the whole commercial community, and as it is defined by the law. The money is deposited for the convenience and safety of the customer, and the consideration to the bank for keeping and paying it out on checks is that they have the use of it while thus deposited. The drawing of the check is in and of itself an appropriation of its amount out of the funds in the banker's hands; and, after notice of such appropriation, neither the drawee nor the bank can withhold the funds so appropriated. *In re Brown*, 2 Story, 516; Story on Pr. Notes, § 489; *Bœhm* vs. *Stirling*, 7 Tenn. R. 429; 3 Kent's Com. 104, note c.

It is of no consequence, and does not alter the relation between the parties that cash so taken is not held in specie, as a special deposit to be kept and returned in the same form as deposited, or that it amounts merely to a credit to the customer on the part of a bank, and goes into their general assets. The only important inquiry is upon what contract is the money taken, and does the bank, by taking it, assume and agree to pay on demand the checks of the customer to the holders who should present them? That such is the contract of the bank cannot now be disputed. Indeed, upon the strength of it the courts have very properly held that where the banker refuses to pay a check upon presentment, by mistake, supposing at the time he was not in funds, when in fact he was, the drawee could maintain an action of tort or contract, and recover nominal damages, though he could prove no actual injury. *Marzetti* vs. *Williams*, 1 B. & Ad. 415; Chitty on Bills, 280, 281; *Harker* vs. *Anderson*, 21 Wend. 379; *Little* vs. *The Phœnix Bank*, 2 Hill, 431; *Whitacre* vs. *Bank of England*, 1 Cromp., Mees. & Ros. 741.

There is also a principle of law equally well settled by a series of authorities, as is the contract between the banker and his customer, which is applicable to the case in hand, and which, applied to that contract, seems to me decisive. It is this:—Whenever one person puts money into the hands of another to be paid to a third, or whenever one, for a good consideration, contracts with another that he will do some act for the benefit of a third person, the third person,

in such case, can maintain an action in his own name against the person so receiving the money or making the provision for his benefit, although there was no privity of contract between them, being in fact perfect strangers. This has been settled in a great variety of cases, both in this State and elsewhere, as where A paid B money, with directions to pay it to C, or where one, owing debts to various persons, assigned property to another, taking his written agreement to pay certain creditors of the assignor. 22 Am. Jur. 17; 2 Greenl. Ev. 109; *Arnold* vs. *Lyman*, 17 Mass. 404; *Hall* vs. *Marston*, 17, Mass. 575; *Felton* vs. *Dickinson*, 10 Mass. 287; *Carnegie* vs. *Morrison*, 2 Met. 402; *Fulton* vs. *Poole*, T. Raymond, 302.

The objection that has been urged to a recovery by the plaintiffs, that where one owes another, and the creditor undertakes to assign a part of the debt, the debtor is not bound in law or equity to take notice of such assignment, has no weight, and is not even applicable to the case at bar. The reason given for the rule in that case is this, the debt being entire, the debtor cannot, against his consent, be made accountable to several debtors instead of one; he can well rely upon his contract, and say I agreed to pay one, not many. This reason, and the only one given for it, does not apply in the case of the banker, because he has contracted with his customer that he would pay the funds in his hands to as many different persons, and in as many different parts as the customer should order by his written checks. In the one case making the debtor liable to more than one would be directly in conflict with his contract, and in the other directly in accordance with its very terms.

We have then the contract of the banker with his customer who deposits money with him, that he will pay it upon the written checks of the depositor to the persons who shall present them; and also the well established principle of law, that whenever one promises another that he will pay money, or do an act for the benefit of a third person, the third person may sue in his own name, although no consideration moved from him, and no contract was made between him and the person sued. Apply this clearly defined and authoritative rule to the contract between the banker and his customer, and will it not inure to the benefit of the holder of a check drawn by the depositor

on the banker? How can such a conclusion be escaped? The banker promises the depositor to pay the person who may hold and present a check drawn by him, and on the strength of that promise the holder takes the check and presents it; why should he not maintain his action against the banker on the ground that the latter has made a contract for his benefit, indeed to pay him money directly? It would be admitted that the case would be within the strict letter, as well as the spirit of the rule, if the persons in whose favor checks were to be drawn were named at the time of the deposit. Can the fact that the *cestui que use*, viz. the check holder, is not named, make any difference in principle? There are a great variety of contracts that are legal, and can be enforced by those who had no interest in them at their inception, as in the familiar case of a promise to pay a reward to any one who should restore lost or stolen property; or the still more familiar one of a promise to pay money to order or bearer, in either of which cases the contract might be enforced by an action in the name of one not *in esse* at the time of its inception.

But upon this point we are not without the aid of express authority, and that of the highest character. In the case of *Weston* vs. *Barker*, 12 Johns. R. 276, a third person had assigned to the defendant certain demands, which were to be collected by him, and appropriated first to the payment of certain specific debts of the assignor, and the balance held subject to his order. This assignment was accepted by the defendant, and after he had collected the claims the assignor ordered the defendant to account for the balance with the plaintiff, which the defendant refused to do. The court held, that although at the time the assignment was accepted the plaintiff was not named, and although it was an agreement on the defendant's part to pay to any person the assignor might order, still an action could be maintained against the defendant in the name of a payee of an order subsequently drawn. This case seems to me to be decisive of the objection that at the time of the banker's contract with his customer the persons to whom the money is to be paid are not named. The contract is to pay to the customer's order, and when the order or check is drawn the person to whom payment is to be made becomes

fixed and ascertained. To the same effect is the case of *Fenner* vs. *Meares*, 2 Wm. Bl. 1260. And although the authority of the case has been somewhat questioned subsequently by Lords Kenyon and Ellenborough, it was not overruled, and I think the opinion given by Lord Chief Justice De Grey, and acquiesced in by the court, addresses itself to the judgment as being both too well considered and too well founded upon principle to be shaken by the hasty dicta of the learned judges before mentioned. Indeed, if these two cases are to be considered as authority, they would seem to go far towards settling the main question in this case.

It is true, undoubtedly, that there is no precedent exactly in point to sustain the position here taken, but it is equally true that there is none directly in point against it. The boast of the common law is, that it is not necessary to provide in terms for every possible case that can arise out of the ever-varying and shifting, and almost innumerable relations subsisting between men engaged in commerce and business in a highly civilized community; but that it provides a system, a collection of general principles applicable to all cases, by which the rights and duties of each and all, growing out of such relations, may be established and defined. To refuse to apply a well established and general principle to a new case that may arise, because there is no precedent for it, would be contrary to the policy of the law, and directly in conflict with the genius of the whole system.

The result to which I have come is, that a holder of a check, who presents it to the banker upon whom it is drawn, who is in funds on account of the drawee, and is refused payment, can maintain his action as well against the banker as the drawee. Such a rule would work no practical difficulty. On the contrary, no presentment for acceptance being necessary, and bankers being obliged to pay in the order in which checks are presented, it would add to the diligence of holders in collecting them, and increase confidence in a class of securities generally used and highly necessary in a business and commercial community.